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Case and Comment

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Historic Supreme Court Battles

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Condensed from The American Mercury, January, 1948

SOME time after Supreme Court Justice Robert H. Jackson issued his public statement criticizing Justice Hugo L. Black in June 1946, the writer received a questionnaire from the American Institute for Public Opinion (the Gallup Poll). One of the questions asked if my opinion of the United States Supreme Court was as high as it had been ten years ago. I promptly answered, "Yes." Although many newspapers had treated the incident as though it was without precedent, I knew that such intra-Court squabbles were not uncommon in the annals of our highest judicial body. But it was in keeping with Court tradition that when Justice Jackson returned to the United States from his distinguished service at the Nuremberg Trials he greeted Justice Black with cordiality, and both men have since acted as though the dispute had never taken place.

However, another storm has broken. At the opening of the new Term of the Court last October, public announcement was made of a blistering dissent by Justice Jackson (concurred in by Justice Frankfurter, reported in 92 L ed Adv 1) criticizing an opinion of the Court which had sustained the Securities & Exchange Commission in barring the management of the Federal Water and Gas Corporation from profiting from the purchase of stock during the reorganization of the company. The dissent said that there was "no law or regulation to support the Commission's order." And, as to Justice Murphy's majority opinion, Justice Jackson, in his dissent, said: "I give up. Now, I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'"

After all, as Justice (later Chief Justice) Hughes once said, the Supreme Court is made up, as is every human institution, of "imperfect human beings," and it has "the inevitable failings of any human institution." We should not expect that perfection of temperament and that unchanging restraint of temper that has been found missing even in supernal realms. Jupi-

ter had his hands full keeping peace among the gods and goddesses on Olympus, and even Jehovah had to fling Satan from the heavens because he was breeding disharmony among the eternals.

Moreover, that members of our High Court have often bickered among themselves has been known to all students of that tribunal. Some of these differences found utterance in unseemly happenings while the members were in actual session, others in their off-bench association. Some justices have used their written opinions as a vehicle for expressing unflattering comments on their colleagues' views. Other judges, in private diaries and memoranda, have left a record of resentment at the judicial action of some of their brethren.

The Court has rendered thousands of decisions, many accompanied by lengthy opinions. Some have profoundly influenced our institutions. Many of the dissenting opinions led to the fermenting of public feeling which in time caused a later bench to interpret the law as a minority once had. Justice Hughes has said: "We are under a Constitution, but the Constitution is what th judges say it is." Briefly touching upon some of their opinions, we will find that, throughout the history of the Court, its members have been independent thinkers who expressed themselves vigorously and who often, in so doing, did not spare their colleagues.

The case of Pennsylvania v. Wheeling Bridge Co. (1850) 13 How 518, 14 L ed 249, involved the existence of a bridge over the Ohio River in the state of Virginia. The state of Virginia had authorized the bridge, but the state of Pennsylvania brought a bill in equity against it as a public nuisance since it interfered with the passage of river steamboats with high funnels. The majority of the Court supported the older form of transportation. Justices Taney and Daniel united in denouncing the decision. Daniel, in a fiery dissent, said: "Such an act as this court has been called upon to perform; such an act as it has just announced as its own, is, in my opinion, virtually an act of legislation, or, in stricter propriety (I say it not in an offensive sense), an act of usurpation."

In 1854 the Supreme Court decided the case of the Piqua Branch of the State Bank of Ohio v. Knoop, 16 How 369, 14 L ed 977. The Bank had been organized under an Ohio law which allowed banks a lower tax rate than other corporations. The law was repealed a few years later. The Bank claimed that the new law was unconstitutional, as constituting an impairment of contract. The majority of the Court gave judgment for the Bank on the ground

that it possessed an irrepealable contract. Justice Campbell in a dissenting opinion referred to the plaintiffs as "adventurers" "with greedy appetites for monopolies," and continued by asking "what remedy have the people if, as a result of vicious legislation, the state finds its property alienated, and its powers of taxation renounced in favor of chartered associations? . . . Under doctrines of this Court . . . the most deliberate and solemn acts of the people would not serve to redress the injustice, and the over-reaching speculation upon the . . . corruption of their legislature would be protected by the powers of this Court."

In the fateful Dred Scott decision (1857) 19 How 393, 15 L ed 691, the Supreme Court decided that a Negro was not a "person" and therefore could not sue in the United States Courts. Justices Curtis and Field filed dissenting opinions. Curtis always insisted privately that there were many pages in the published opinion of Chief Justice Taney that had not been delivered orally. A bitter correspondence on this subject followed between Curtis and Taney until Curtis became so disgusted that he resigned from the Court. After the decision, Lincoln said of the Court: "Our judges are as honest as other men and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps."

In 1870 occurred an episode which profoundly shook the prestige of the Court. During the Civil War, paper money had been issued and it was decreed to be legal tender in the payment of debts. The paper money depreciated in value. Holders of mortgages and other creditors attacked the Legal Tender Acts. The question of their constitutionality came before the Court in the case of Hepburn v. Griswold, 8 Wall 603, 19 L ed 513. The judges in their conference discussion of the case before coming to a decision, divided four to four. Among the judges upholding the Acts was Justice Grier, who was 76 years old and half senile. He was prevailed upon to switch his vote. And so, by a vote of five to three, the Legal Tender Acts were declared unconstitutional insofar as they applied to contracts entered into before the Acts were passed. The next week all the other justices sent one of their number, Justice Field, with a message to Grier that "it was their unanimous opinion that he ought to resign." He did so. That left seven judges on the bench, of whom four had voted against the constitutionality of the Acts.

The resignation of Grier caused a vacancy in the Court, and Congress increased the number of judges to nine. President Grant promptly appointed two new judges. Shortly thereafter, the Court by a five-to-four vote (two of the five were the new

Judges appointed by Grant and the other three were the old minority) reversed Hepburn v. Griswold and held the Legal Tender Acts constitutional in regard to all contracts, whether made before or after the passage of the Acts. Mr. Justice Miller afterwards criticized the conduct of Chief Justice Chase, in getting one of the justices to change his vote, as having resorted to an unworthy device to accomplish his purpose.

Some few years later, Justice Field's mental condition became such that his associates suggested that he retire and reminded him how he had once made the same suggestion to Grier. The old judge listened and finally shouted: "Yes! And a dirtier day's work I never did in my life." He remained for twelve more years.

In 1873 the Supreme Court decided the celebrated Slaughter House Cases, 10 Wall 273, 19 L ed 915. The legislature of Louisiana had passed an act granting certain monopoly privileges to slaughter houses which,

"It's pretty good, but I still don't think we ought to try for a government contract."

however, had to be located in certain prescribed areas of New Orleans. The constitutionality of the act was attacked on the ground that by limiting slaughter houses to certain districts, the plaintiffs were deprived of property "without due process of Law" and that the act thereby violated the Fourteenth Amendment. By a five-to-four decision, the Court held the statute valid. One of the dissenting Justices attacked the majority opinion, saying: "This Court has no authority to interpolate a limitation (upon the Fourteenth Amendment) that is neither expressed or implied. Our duty is to execute the law, not to make it. . . . To the extent of that limitation it turns, as it were, what was meant for bread into a stone."

In 1895 the Supreme Court declared unconstitutional the income tax law, Pollock v. Farmer's Loan and T. Co., 157 US 429, 39 L ed 759, 15 S Ct 673, which had been passed the year before. Justice Harlan, in delivering his dissenting opinion, violently pounded the desk before him, glared belligerently at the Chief Justice and at Justice Field and, it is said, shaking his finger accusingly in their faces, said in loud tones: "If that is the Constitution, the Constitution cannot be amended too quickly. . . . On my conscience I regard this decision as a disaster." Most outspoken of all was Justice Brown who said that "The decision involves nothing less than a surrender of the taxing power to the moneyed class." It took an amendment of the Constitution — the Sixteenth, ratified in 1913—to overrule this decision of the Court and establish effective Income Tax legislation.

The Northern Securities case in 1904, 193 US 197, 48 L ed 679, 24 S Ct 436, saw the Supreme Court order the dissolution of a holding company on the ground that the Sherman Anti-Trust Act had been violated. The Sherman Act stated that any person guilty of its violation should be "punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both fine and imprisonment." The case involved J. P. Morgan and James J. Hill and the Court held that the cases were civil, not criminal. Justice Holmes in his dissenting opinion protested this twisting of the intent of the law. Said Holmes: "It is vain to insist that this is not a criminal proceeding. . . . I say we must read the words before us as if the question were whether two small exporting grocers should go to jail."

In the case of Abrams v. United States (1919) 250 US 616, 63 L ed 1173, 40 S Ct 17, the Supreme Court upheld a long prison term imposed upon five Russians in New York City who had issued a leaflet expressing resentment at the invasion of

Russia by United States troops. The leaflet quoted some phrases from the Communist Manifesto of 1848. The majority of the Court held that the leaflet was an appeal to "the workers" to "put down by force the government of the United States." Justice Holmes, with Justice Brandeis concurring, sharply dissented, stating: "In this case, sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government had to publish the Constitution of the United States now vainly invoked by them."

The case of Adkins v. Children's Hospital, 261 US 525, 67 L ed 785, 43 S Ct 394, in 1923, led to a five-to-four decision outlawing a minimum wage for women in the District of Columbia. Justice Holmes, in another famous dissent, said that to him the power of Congress to pass the legislation at issue seemed "absolutely free from doubt. . . . When so many intelligent persons who have studied the matter more than any of us, have thought that the means (of removing conditions leading to ill health, immorality, and the deterioration of the human race) are effective and worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men." Subsequent minimum-wage legislation was undisturbed by the Courts. The Court's change of attitude can be traced to the Holmes' dissent in the Adkins case.

In 1928 the case of Olmstead v. United States, 277 US 438, 72 L ed 944, 48 S Ct 564, produced a five-to-four decision in which the Supreme Court held that no constitutional rights of the defendants had been infringed by allowing in evidence testimony that had been obtained through wire-tapping by prohibition agents. Justice Holmes sharply dissented, maintaining that while it was desirable for criminals to be detected, "the government should not itself foster . . . other crimes" as a means of obtaining evidence. Justice Holmes continued, calling the government's wire-tapping a "dirty business," and that it was "a less evil that some criminals should escape than that the Government should play an ignoble part."

Justice Brandeis again concurred in Holmes' dissent, saying: "To declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible restitution. Against that pernicious doctrine this Court should resolutely set its face."

In the Oklahoma Ice Case (1932) 285 US 262, 76 L ed 747, 52 S Ct 371, the Supreme Court nullified an Oklahoma law regulating competition in the ice business on the ground that this

business was not sufficiently "affected with a public interest" to justify the law. Justice Brandeis wrote a powerful dissenting opinion (concurred in by Justice Stone) wherein he held that the Court could prevent social and economic experimentation, but also warned that, "in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."

The 1936 test case of United States v. Butler, 297 US 574, 102 ALR 914, 80 L ed 477, 56 S Ct 312, marked the end of the AAA and led to the decision that Congress had no right to make payments to farmers for voluntary reduction of acreage or production. Justice Harlan F. Stone, in a dissenting opinion, used the frequently quoted comment:

> "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

In the case of Ashwander v. Tennessee Valley, 297 US 288, 80 L ed 688, 56 S Ct 466, a few months later, the opponents of the Tennessee Valley Authority tried to bring about a test of the constitutionality of the act creating the Authority. However, the facts showed that the Authority had constructed a dam to improve the navigation of the Tennessee River. This was clearly within the power of the government, and involved only indirectly the main constitutional question, *i.e.*, the right of the government to own and sell electric energy in competition with private companies. The Supreme Court by a vote of eight to one decided in favor of the government, but Chief Justice Charles Evans Hughes went out of his way to attack the constitutional authority of the government to acquire energy except for certain limited purposes. Justice Brandeis, in a separate opinion in favor of the government, stated sharply that "considerations of propriety as well as long-established practice" should have prevented any discussion of the constitutionality of the Tennessee Valley Authority in any case where the constitutionality of the Authority was not involved.

In the beginning of 1944, the majority of the Court held in the case of Anderson v. Abbot, 321 US 349, 151 ALR 1146, 88 L ed 1090, 64 S Ct 531, that stockholders of a defunct Kentucky bank-stock holding company were liable for an assessment on shares of a national bank in the portfolio of the holding company, under double liability legislation formerly enforceable

against national banks. Justice Jackson, writing for the dissenters, said that the majority was "professing to impose" its ideas on double banking liability "not as a matter of judge-made law, but as a matter of legislative policy, and it cannot cite so much as a statutory hint of such a policy." His dissent said further: "The Court is not enforcing a policy of Congress; it is competing with Congress in creating new regulations in banking, a field peculiarly within legislative rather than judicial competence."

In early 1945, in the case of Central States Electric Company v. Muscatine, 324 US 138, 89 L ed 801, 65 S Ct 565, the Court rendered a five-to-four decision on the question of refund of gas rates to consumers in Iowa. Justice Black, in dissenting, said: "Thus, by a strange quirk of statutory construction the effort of Congress to protect consumers from excessive rates is transformed, where litigation is pending, into an act which exploits consumers and unjustifiably enriches distributing companies."

And so, as we have seen, there have been many sharp clashes among the Justices on the supreme bench. The Jackson-Black affair simply brought into sharp focus the dissension among members of the High Court of which there had been recurring rumors in previous months.

Of course, we want a harmonious Court but not at the cost of independent thinking among its members. Far better for the nation that we have vigorous disagreements among our Supreme Court Justices than such unanimity as accompanied the decision of the Court in 1819 in the case of Sturges v. Crowninshield, 4 Wheat 122, 4 L ed 529. The decision was unanimous but Justice Johnson confessed that "the Court was greatly divided . . . and the judgment partakes as much of a compromise, as of a legal adjudication. The minority thought it better to yield something than risk the whole."

It is better to sacrifice unanimity if it can be gained only at the cost of independent thinking and fearless expression. When strong-minded men express themselves they may do so too strongly, often forgetful of the amenities. So far as the Supreme Court is concerned, the sharp utterances in recent months will cause misgivings only among the unthinking.

The Lawyer in His Profession

By FATHER EDWARD A. McGRATH, S.J.

Condensed from Marquette Law Review, December, 1947

EXTRACTS FROM GRADUATING ADDRESS OF MARQUETTE UNIVERSITY LAW SCHOOL

WE live in a post-war world that has not returned to complete peace — a world in which the war, in its results, is constantly with us, a world in which rumors and threats of new conflict are by no means lacking.

Peace has not yet been achieved — and the effects of these disturbed conditions are visible in our own land, though not, thank God, to the same extent as abroad.

A world-order is in the making—and the process promises to be long and difficult. Human passions of hatred, greed, ambition and revenge have been loosed and will not easily be brought back under orderly restraint. All the peoples of the world, if we can believe the public declarations of their leaders, want peace and order and tranquility in which to rebuild, to repair the ravages of war and to attain a reasonable standard and mode of life. But the prospects are not too bright—and the reasons, some of them at least, are not too obscure or too difficult to name.

If men are to live in a harmonious and peaceful world society, there must be some agreement on how men should live. Certain elementary and primary principles of a philosophy of man, a philosophy of the state, a philosophy of government and politics, and a philosophy of law must achieve common acceptance and must be made effective. For where there is conflict in basic philosophies there are the roots and seeds of war.

The world today is split by two basically opposed philosophies of man—the one totalitarian, the other democratic in fundamental concept.

On the one hand we see still in force the same general philosophy, which, glorifying race or state, and denying the worth of individual men, set the stage for the last great war. For there you have even today the acceptance of slavery of the weak, however the fact may be named, the doctrine of regimentation of subject peoples and of citizens for the purpose of national power and aggrandizement. There you find the ruthless exploita-

tion of men for the establishment of a planned and regimented economy at home, and power politics abroad.

Now the state operates through law, and the plans of government are effective by law, and the relationships of citizens and government are defined and regulated and controlled by law. And if this law be a law of force —if it be devoted to state supremacy—if it be based on the denial of human rights, and is thought of as above and beyond all considerations of morality and abstract justice, then you have a law, and a consequent theory of society and government and politics that cannot in any way lead to peace. Our nation occupies today a position of influence for good that is without precedent in history. The gaining of peace, and the character of that peace, and the terms and conditions under which society will live will be determined largely by our influence in shaping world policies.

It is fortunate indeed that we are in this strategic position, for the United States possesses, and our theory of government is based upon, the sole philosophy of law that can in any way insure peace and tranquility, liberty and justice to men.

The traditional American philosophy of law must not be forgotten or abandoned. Whatever may be the forms of government by which states operate, the fundamental principles which have controlled this land must ever be observed and held in reverence. And thus the blessings that we enjoy and prize so jealously may be shared by a world that sadly needs security and peace and freedom from fear.

This country is dedicated to the doctrine of human rights, inalienable rights, "conferred by Nature and by Nature's God"—it is intent upon the preservation of these rights, the safe-guarding of liberties and the advancement of the common good. Our government—"of the people, by the people, for the people", "derives its just powers from the consent of the governed." It is not dictatorial; it is not totalitarian; it is democratic in concept and in purpose. The laws of God, and the natural moral law found embedded in human nature have traditionally supplied the background for our law and our government. And so our courts, insisting we are a Christian people, have appealed to the natural moral law with surprising frequency.

But new philosophies have appeared in the land, and new theories of the scope of law and the functions of our courts have begun to gain acceptance.

There are men who simply deny that law has ever been concerned with rights, or liberties, or justice. In their opinion the law and the courts have never been other than tools in the hands of dominant groups in the state for securing and perpetu-

ating their selfish domination and control. And so the practicing lawyer need not concern himself too much with idealistic theories of justice and rights.

There are others less cynical by far, and public spirited, intent upon the common good as they understand it, who would enlarge and change the functions of our courts. Since, in their understanding, the law has no meaning until a judicial interpretation has been made, the courts are to consider themselves not merely as interpreters of law, but to a considerable extent as legislators. They would have the courts not too tightly bound by the intentions of the legislators — they would rather have the courts liberalize the law, interpret law in terms of present needs — in brief, the courts are to engage in "sociological engineering", to guide and direct the progress of the nation.

There are others who completely deny that the courts are really concerned with law at all. They charge all the dignified panoply of justice, and all the machinery and procedures of the courts with being essentially dishonest pretense. For they assert that judges do not judge according to law, but rather on the basis of a "hunch" or a "premonition" or a prejudice, and that the citing of precedent is merely a means of excusing a prejudice or justifying a "hunch" or rationalizing an independent judgment.

Now in all these criticisms and theories there are, of course, some elements of truth, but in all of them are elements of danger—and against these dangers we must be on our guard. For our continual welfare will depend upon our preservation of traditional American ideals and concepts of law.

By virtue of the degrees conferred upon you today you are admitted to the goodly fellowship of the ancient and honorable and noble profession of law. You will find yourselves in a position intimately and vitally to affect, for good or for ill, the fortunes and the very lives of those with whom you deal. For the law affects the citizen at almost every moment of his life. All his public dealings with his fellows are controlled by law—his private interests and his personal safety are affected by law. His rights and liberties are subject to its control.

And to you, as practitioners, or as future judges or legislators the well being of your fellows and the security of society are, in large part, entrusted. You are engaging in the practice of a profession and not a trade. While you will find in the law a means of livelihood, that will not be your principal concern. You will be of service to your fellowman, with an eye on his benefit and aid, and not primarily to your advantage and profit. For

that is what a profession demands. Those who follow a profession are supposed to be dedicated to the service of mankind.

Their personal interests are secondary and subordinate to the good that they can do. They are the repositories of others' secrets, the recipients of confidences, the custodians of others' goods. The goods and often the reputations and the very lives of others are entrusted to their care with full trustfulness and complete confidence. They are expected to be men and women of high ideals, sound principles and complete integrity.

On no other groups is such complete confidence conferred. On no other groups does the safety and the welfare of society so heavily depend.

In joining the numbers of those who follow the profession of the law, a man makes large promises of unselfish devotion and of service, and assumes real and heavy responsibilities.

"I'm sore at my heirs again, Wilcox. This time deed everything back to the Indians."

Condensed from Fordham Law Review, November, 1947

BASEBALL AND THE ANTITRUST LAWS....

By JOHN W. NEVILLE

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The views and opinions expressed herein are the author's and do not purport to represent Justice Department thought in any way.

THAT organized baseball is a monopoly, there can be little doubt. It was so labelled as early as 1914 when it had yet to attain its present day magnitude and perfect the system of self discipline which now enables it to control and dominate the field so completely, *American League Baseball Club v. Chase*, 86 Misc 441, 149 NY Supp 6. Organized baseball today means the major leagues represented by teams from ten metropolitan cities, the minor leagues with teams in practically every state in the Union and the provinces of Canada, a Commissioner of Baseball paid at a yearly stipend of $50,000, transportation across the breadth of the land, radio, television, the All-Star game, the World's Series. It all adds up to big business, as the expression is commonly understood, but is it "trade" or "commerce," is it subject to the provisions of the Sherman Act directed against monopolies and restraints of trade? Some twenty-five years ago the Supreme Court answered "No." Would the Supreme Court give the same answer today? That is the question.

The Case

National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 259 US 200, 52 L ed 352, 42 S Ct 465, marked the culmination of a prolonged battle between rival forces seeking to rule over major league baseball. The plaintiff, a baseball club incorporated in Maryland, was a member of the Federal League of Professional Baseball Clubs, an organization which became defunct because of defendants' conspiracy, it was alleged, to monopolize the baseball business; this the defendants (the National League of Professional Baseball Clubs, the American League of Professional Baseball Clubs, composed of groups of eight incorporated baseball clubs, the officers of the two leagues and sundry other

persons) accomplished by buying up some of the constituent clubs of the Federal League, and otherwise reducing the League to a "one team league," namely the plaintiff. A judgment trebling a verdict for plaintiff for $80,000 recovered in the District of Columbia Supreme Court under Section 7 of the Sherman Act, was reversed by the court of appeals, with which the United States Supreme Court concurred on appeal.

Justice Holmes, rendering the opinion of the Court, in effect adopts as his own the opinion of the court of appeals which "went to the root of the case," and is content to state his views really in one paragraph.

> "The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the League must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 US 648, 39 L ed 297, 15 S Ct 207, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of the words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State."

Application of a Legal Formula

Since Justice Holmes lays such emphasis on the decision of the District of Columbia Court of Appeals, we shall use that decision as a spring-board for discussion. It stands for the proposition, of course, that baseball is not commerce and is therefore not within the provisions of the Sherman Act. The court, after defining trade and commerce variously as traffic, as the act or business of bartering, trading, buying or selling goods or commodities, finally concludes that the definitions include traffic in persons and intelligence, as well as commodities. Indeed it was already well settled that trade or commerce concerned itself with intangibles as well as tangibles, with inanimates as well as animates.

One would not imagine at this stage that there are any real distinctions to be made between intangibles as such, and that one type of intangible would call for different judicial treatment from another, yet that is precisely what occurred in the *Federal Baseball* case. While the court readily adapts itself to the concept of "commerce" applied

to "intelligence" it balks at an exhibition of baseball which it claims "is local in its beginning and in its end," and is not susceptible of being transferred in trade or commerce. As a matter of current sports expression, games are "transferred" from one location to another every day, games are "bought," games are "sold," games are "thrown."

The connotation of trade or traffic in games or sports is inescapable. But aside from any conclusions suggested by sports lingo, does not the transfer of a game of baseball, what with players and equipment to be transported from one place to another, entail more traffic in the concrete sense of the word, than a telegram sent over the same route? The court notes that major league baseball involves the transportation of players and paraphernalia, but argues that such transportation is incident to the main purpose of the enterprise, the production of the game, "it was for it they (the defendants) were in business." Parenthetically it might be said that the main purpose of the enterprise was not to produce a game but to seek financial gain, as in the case of any other commercial undertaking.

United States v. American Medical Ass'n

"Suppose a law firm in the city of Washington sends its members to points in different states to try lawsuits; they would travel, and probably carry brief cases and records, in interstate commerce. Could it be correctly said that the firm, in the trial of the law suits, was engaged in trade or commerce?" The court in the *Federal Baseball* case merely asks the question assuming that a negative answer is self-evident, but is the answer so self-evident as it is made to appear?

In *United States v. American Medical Ass'n*, 110 F(2d) 703, (App DC 1940), the United States Court of Appeals for the District of Columbia reversed a lower court judgment sustaining a demurrer to an indictment for conspiracy in restraint of trade, in violation of Section 3 of the Sherman Act. In its general terms the indictment charged that the American Medical Association, representing a membership of 116,000 of the country's 145,000 physicians, and others, had conspired to destroy the business and activities of Group Health Association, Inc., a cooperative non-profit association, organized for group medical practice on a risk sharing basis. The trial court was of the opinion that the practice of medicine and the business of Group Health did not constitute trade within the intent of the Statute. The court of appeals, proceeding on the broad theory that any contract unenforceable at common law because in restraint of trade, was within the inhibitions

of the antitrust laws, held that in so far as Section 3 of the Sherman Act was concerned, the practice of medicine was trade.

It is important to bear in mind that the decision, in its application, is limited to Section 3 of the Act, that it recognized the difference between an exercise of legislative power under the commerce clause of the Constitution and the plenary power of Congress to legislate for the District of Columbia, but it served to rebut any foregone conclusion, as expressed in the *Federal Baseball* case, that the learned professions and inferentially other lines of personal endeavor, are *ipso facto* without the scope of legislation applicable to trade and commerce. It is also clear that had the *Federal Baseball* case been instituted under Section 3 of the Sherman Act, the same arguments could have applied and similar results been achieved.

From the Secretary's Viewpoint

Contributed by: Elsie M. Winchell, Media, Pa.

(THE CASE)

On a dark, rainy night—there's no traffic light,
Brakes screech with the blast of a horn,
Two vehicles smash with a terrible crash,
And, presto!—a lawsuit is born.

The Statement of Claim says John Doe is to blame,
The defendant with vigor denies it,
The parties will bicker, the lawyers will dicker,
—And the jury finally tries it.

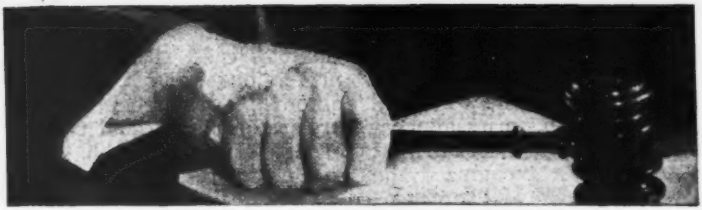
I. D. Fendum, Esquire, says the plaintiff's a liar,
In suave, polite language, of course,
He files some New Matter, the record grows fatter,
And the battle is on, in full force.

(THE COMMENT)

The Statement is ended, then must be amended,
Or—"There's just a correction or two",
It is nearly redrawn, then as time marches on
'Tis rejected, or pencilled in blue.

With a weak, sickly grin, the poor steno digs in,
To grind out the umpteenth revision,
And while typing furiously, conjectures curiously,
What will be the final decision.

'Tis ever the same, be there trucks in the Claim,
Or merely two battered jalopies,
There's page after page—all learned and sage,
—And usually six carbon copies!



Among the New Decisions

Automobiles — *custom as admissible on issue of negligence.* In Langner v. Caviness, — Iowa —, 172 ALR 1135, 28 NW2d 421, opinion by Justice Garfield, it was held that upon the issues of negligence and contributory negligence evidence of custom in the performance of similar acts, while not a conclusive test, is generally admissible.

The annotation in 172 ALR 1141 discusses "Custom or practice of drivers of motor vehicles as affecting question of negligence."

Constitutional Law — *discrimination between men and women in license as bartenders.* Women are different from men. In Fitzpatrick v. Liquor Control Commission, 316 Mich 83, 172 ALR 608, 25 NW2d 118, opinion by Judge Boyles, it was held that a provision of a statute, enacted for the expressed object of providing control of the alcoholic liquor traffic, that each applicant for license as a bartender, with certain exceptions, must be a male person, is not unconstitutional on the ground that the discrimination between males and females has no reasonable relation to the object of the legislation.

The annotation in 172 ALR 620 discusses "Validity and construction of statute or ordinance respecting employment of women in places where intoxicating liquors are sold."

Constitutional Law — *validity of statute requiring fire escapes in hotels charging $2 a day and more.* In Geele v. State, — Ga —, 172 ALR 196, 43 SE2d 254, opinion by Presiding J. Duckworth, it was held that a statute requiring the provision of outside fire escapes in hotels charging guests $2 a day and more is unconstitutional as making a classification having no reasonable relation to the purpose of insuring the safety of guests; and no basis for such classification is afforded by the fact that the provision of fire escapes might require an increase in the

charge for accommodation beyond the ability of some to pay.

The annotation in 172 ALR 203 discusses "Validity of classification of hotels involved in statutes respecting fire escapes or other provision for safety, comfort, or convenience of guests."

Constructive Eviction — *what amounts to.* The case of Schneider v. Lipscomb County National Farm Loan Asso. — Tex —, 172 ALR 1, 202 SW2d 832, is a decision of considerable importance. The opinion was written by Justice Smedley. It is there held that even if an award of public land to a third person by the commissioner of the general land office pursuant to statute could be considered a formal, authoritative assertion of title by the state, there is no constructive eviction such as will support an action for breach of covenant of general warranty where the covenantee does not yield to such award but remains in possession and attempts to defend his title.

The annotation in 172 ALR 18 discusses "What amounts to constructive eviction which will support action for breach of covenant of warranty or for quiet enjoyment."

Co-operatives — *right to franchise for use of highway.* In State ex rel. York v. Walla Walla County, — Wash2d —, 172 ALR 1001, 184 P2d 577, opinion by Judge Steinert, it was held that it cannot be held as a matter of law that a co-operative association engaged in the business of generating, purchasing, acquiring, selling, and distributing electric power for the benefit of its members only is not acting for the public interest within a statute authorizing the board of commissioners to grant franchises to persons or private or municipal corporations to construct and maintain electric light lines and any other such facilities in the right of way of county roads if the board deems it to be for the public interest.

The annotation in 172 ALR 1020 discusses "Use of streets and highways by co-operative utility."

Crops — *conveyance of land as passing title to unharvested crops.* Justice Luxford, in Wood v. Wood, — Colo —, 172 ALR 812, 183 P2d 889, wrote an opinion holding that a matured but unharvested crop of corn standing upon land at the time of a conveyance of title to the land by a warranty deed without reservations possesses the character of personalty and does not pass with the title to the land.

The annotation in 172 ALR 815 discusses "Conveyance of land as including mature but unharvested crops."

Declaratory Judgment — *existence of other remedy.* The Texas Supreme Court in Cobb v. Harrington, 144 Tex 360, 172 ALR 837, 190 SW2d 709, opinion by Smedley, J., held that the

existence of another adequate remedy does not bar the right to maintain an action under the Uniform Declaratory Judgment Act for a declaratory judgment.

The annotation in 172 ALR 847 discusses "Right to declaratory relief as affected by existence of other remedy."

Divorce — *support of children — mother's right to proceeds.* In State ex rel. Casey v. Casey, 175 Or 328, 172 ALR 862, 153 P2d 700, opinion by Chief Justice Bailey, it was held that an order entered by the court which granted a decree of divorce and awarded custody of minor children to the mother, directing the father to pay a fixed amount each month to the clerk of the court for the support of children but appointing no trustee to receive and expend the money, requires that the money be paid to the clerk for the purpose of being paid over to the mother as custodian of the children and gives her sufficient interest to institute contempt proceedings for the enforcement of that order.

The annotation in 172 ALR 869 discusses "Contempt proceedings to enforce decree or order in divorce or separation suit for support of children."

Eminent Domain — *condemnation of land for purpose of hunting and fishing.* The sports-loving public will be disappointed by the decision in Peavy-Wilson Lumber Co. v. Brevard County, — Fla —, 172 ALR 168, 31 So2d 483, opinion by Adams, J. The court held that a county has no power to condemn 490 acres of wild rural land for the purposes of hunting and fishing, under a statute authorizing counties to condemn land for parks, playgrounds, recreational centers, or other recreational purposes, provided it is determined that there is a public necessity for such taking, since a condemnation for this purpose is not a public necessity or for a county purpose, hunting and fishing constituting a private rather than a public use and bearing no relation to public health, morals, or safety, although the project would serve a public benefit and demand.

The annotation in 172 ALR 174 discusses "Condemnation of land by public authority, to provide hunting and fishing."

Eminent Domain — *cost of repairs and improvements as evidence.* A practical problem was presented in Kinter v. United States, 156 F2d 5, 172 ALR 232, opinion by Circuit Judge O'Connell. It was there held that the owner of land taken by eminent domain, although competent to testify as to its market value, may not be permitted to state as a lump sum the total of all costs incurred by him over a period of years for repairs and improvements as bearing upon the question of fair market value, and the submission of such evidence to the jury constitutes reversible error.

The annotation in 172 ALR 236 discusses "Eminent domain: cost of repairs and improvements on property taken, as evidence of its value."

Equitable Conversion — *application of doctrine to option to purchase land.* It was held in Durepo v. May, — RI —, 172 ALR 429, 54 A2d 15, opinion by Judge Capotosto, that the doctrine of equitable conversion does not apply at the time an option to purchase land, exercisable at any time within the four-year term of a lease, is given to a lessee, when there is nothing in the language of the option indicating the owner's intention thereby to convert the property from real to personal property for all purposes; and where the owner dies intestate between that time and the time of the optionee's exercise of the option, the purchase money must be paid to the owner's heirs as their respective interests may appear, and not to his personal representative.

The annotation in 172 ALR 438 discusses "Equitable conversion doctrine as applicable to option to purchase land, in the event of death of optionor or optionee before its exercise."

"My client is innocent, your honor, but if he is sent to jail could he have his old cell back? He left all his 'pin-ups' there."

Evidence — *Army discharge as evidence of good character.* In Ray v. State, — Fla —, 172 ALR 726, 31 So2d 156, opinion by Associate Justice Williams, it was held that one charged with a sex assault on a little girl is not entitled to put into evidence his honorable discharge from the Army.

The annotation in 172 ALR 729 discusses "Honorable or dishonorable discharge from Army or Navy as admissible on question of character or reputation."

Federal Jurisdiction — *overtime compensation case as removable from state court.* An interesting question of Federal procedure was decided in Johnson v. Butler Bros. 162 F2d 87, 172 ALR 1157. Circuit Judge

Sanborn wrote the opinion holding that the right to bring an action in a state court under the Federal Fair Labor Standards Act for overtime compensation together with liquidated damages and attorneys' fees, conferred by the provision of § 16 (b) of such act that "action to recover such liability may be maintained in any court of competent jurisdiction," may not be defeated by removing to a Federal court an action instituted in a state court.

The annotation in 172 ALR 1161 discusses "Removal to Federal court of suit brought in state court for overtime compensation under Federal Fair Labor Standards Act."

Foreign Corporations — *rescinding license as affecting contracts of.* The Wisconsin Court in MacDonald Bros., Inc. v. Quality Aluminum Casting Co. 251 Wis 27, 172 ALR 488, 27 NW2d 769, opinion by Justice Fritz, held that a statute providing that where a corporation has lost its license to do business in the state, the secretary of state may, on its compliance with certain conditions, "rescind such forfeiture of license and annul all disabilities consequent thereon," does not make a rescission effective to validate a contract otherwise invalid as having been entered into during the period intervening between the forfeiture and its rescission.

The annotation in 172 ALR

493 discusses "Rescission or annulment of forfeiture of license of foreign corporation to do business in the state as affecting previous contracts or transactions of corporation."

Graves — *liability for desecration of.* In Codell Construction Co. v. Miller, 304 Ky 708, 172 ALR 546, 202 SW2d 394, opinion by Dawson, J., it was held that allegations of the amended petition in an action originally instituted by grandchildren of deceased grandparents, as their heirs at law to recover damages for mental pain and anguish caused by desecration of the grandparents' graves, asking leave to prosecute the action for the use and benefit of all heirs "as the common interest in the outcome of the suit," stating there were a number of heirs of the deceased grandparents who were permitted under the law to share in the recovery, and that it was impracticable to bring them into court as parties, are sufficient to support a class action.

The annotation in 172 ALR 554 discusses "Action at law for desecration of grave."

Highways — *power of eminent domain for materials used in construction of.* The circumstances under which a county may condemn materials situated in another place are discussed in Blanton v. Fagerstrom, — Ala —, 172 ALR 128, 31 So2d 330, opinion by Judge Livingston. It was there held that where a statute authorizing counties to condemn materials for the construction of highways does not place a limitation on the sort of highways to be constructed with respect to whether their construction has been delegated to the counties or has been delegated to or remains under the jurisdiction of other state agencies, the statute applies to the construction of all highways of the state and a county has the power to condemn materials in one county for use in the construction of a highway in another county under contract between the state and a contractor.

The annotation in 172 ALR 131 discusses "Condemnation of materials for highway or other public or quasi-public works."

Highways and Streets — *dedication by sale of lots with reference to plats.* Lawyers with real estate transactions will be interested in the opinion by Justice Kenna, of the West Virginia Court, in Rose v. Fisher, — W Va —, 172 ALR 160, 42 SE2d 249. It was there held that no right to the use of a street or alley shown on a recorded plat accrues to one who has acquired from the owner of the lands so platted other adjacent property not indicated on the plat, in the absence of an acceptance of the tendered dedication by the appropriate public authority.

The annotation in 172 ALR 167 discusses "Sale of lots with reference to plat as conferring,

in absence of effective dedication to public, rights upon others than lot owners in respect to streets shown by plat."

Labor Unions — *liability for interference with contract.* The Massachusetts Court in Boylston Housing Corp. v. O'Toole, — Mass —, 172 ALR 1251, 74 NE 2d 288, opinion by Chief Justice Field, held that interference with the performance of a contract between the plaintiff and an elevator company for the installation of elevators in the plaintiff's apartment house, resulting from the refusal of individual members of a local labor union which had a closed shop agreement with the elevator company, to enter the elevator company's employment is not actionable irrespective of the intention that prompted such refusal, where the closed shop agreement did not bind individual members of the union to enter the elevator company's employment.

The annotation in 172 ALR 1274 discusses "Liability of labor union or its members to contractee for their refusal to perform work for contractor with whom they have a closed shop agreement."

Leases — *uncertainty of term for extension.* The Michigan Court in Starr v. Holck, 318 Mich 452, 172 ALR 413, 28 NW2d 289, opinion by Chief Justice Carr, held that if the blank in a provision in a lease for an extension "for .... years" is ignored and the lease construed as providing for an extension "for years," the privilege granted is to be construed as for an additional term of two years, such being the shortest time that may be regarded as satisfying the phrase.

The annotation in 172 ALR 421 discusses "Indefiniteness as to term in option for extension or renewal of lease."

Libel and Slander — *discussion with union business agent as publication.* The general rule that the speaking of defamatory matter to the person defamed is not slander was applied in McDaniel v. Crescent Motors, — Ala —, 172 ALR 204, 31 So2d 343, opinion by Foster, J. It was there held that the making by an employer of statements defamatory of an employee to the business agent of a union whose duty it was to take up with the employer all complaints against union members is not a publication.

The annotation in 172 ALR 208 discusses "Communication to agent or representative of person defamed as publication or as privileged."

Master and Servant — *employer's liability for assault by truck driver on motorist.* Advise your clients not to hire pugnacious employees. In Fields v. Sanders, 29 Cal2d 834, 172 ALR 525, 180 P2d 684, opinion by Spence, J., it was held that an assault committed by a truck

driver upon a motorist who had charged the truck driver with having crowded him off the highway may be held as matter of law to have been within the sphere of his employment where the truck driver was required by law to stop his truck when signaled by the motorist for the purpose of exchanging identifications, and he testified that he remained calm and struck the motorist only because the latter was threatening to strike him, although it appeared that during the discussion he moved his truck a couple of times in order to clear the road for traffic, and although in the action brought against the driver and his employer for the assault the jury impliedly found malice on the part of the truck driver by awarding punitive damages as against him.

The annotation in 172 ALR 532 discusses "Employer's liability for assault by truck driver or chauffeur."

Mortgages — *"dragnet" clauses.* In drawing mortgages

"Of course it would be a privilege to have you as our client,— but may we suggest that you make one more attempt to collect the thirty cents yourself."

it is well to consider the effect of the decision in First v. Byrne, — Iowa —, 172 ALR 1072, 28 NW2d 509, opinion by Judge Smith. It is there held that the "dragnet" clause of a mortgage executed by cotenants to secure specifically the cotenants' joint note of the same date, declaring that the mortgage should stand as security for any other indebtedness that the mortgagee might then hold, or in the future acquire against the mortgagors or either of them, does not operate to pledge the individual interest of one of the mortgagors in the mortgaged property as security for an existing indebtedness of the comortgagor to the mortgagee, his father, then barred by the statute of limitations, of which the cotenant at the time had no knowledge and which was not acknowledged in, or reduced to, writing until the execution of a note some six years later and two days before the commencement of the foreclosure suit.

The annotation in 172 ALR 1079 discusses "Debts included in provision of mortgage purporting to cover unspecified future or existing debts ('dragnet' clause)."

Municipal Corporations — *liability for failure to collect funds for public improvement bonds.* According to the opinion in Foote Co. v. McAlester, 197 Okla 440, 172 ALR 1027, 172 P2d 617, written by Davison, J., a municipality is not liable for an alleged neglect of a city to take necessary steps to collect tax assessments levied to provide a fund for the payment of paving bonds which it had issued, and its alleged neglect and wilful omission and failure to exercise its powers for the payment of such bonds by the issuing of refunding street improvement bonds as provided by statute does not give a holder of such bonds a right of action against the city to recover their face value with interest.

The annotation in 172 ALR 1030 discusses "Liability of municipality in consequence of its inability, refusal, or failure to collect the cost of local improvements from the property benefited."

Negligence — *bicycle and truck driver.* An interesting application of the last clear chance doctrine appears in the case of Lyons v. Great Atlantic & Pacific Tea Co. 301 Ky 827, 172 ALR 732, 193 SW2d 450, opinion by Justice Cammack. It was held that a verdict for the defendants in an action to recover for injuries sustained by a ten-year-old bicyclist in a collision with a truck owned by one of the defendants and driven by the other is not flagrantly against the weight of the evidence where the plaintiff's version of the accident that he was struck by the right front fender of the defendant's northbound truck, being driven in a zigzag manner, short-

ly after the plaintiff had passed a parked truck and was riding north, some 2 or 3 feet from the east curb of a well-lighted street, was in conflict with testimony of the defendants' witnesses that the plaintiff was riding south on the east side of the street and was struck by the defendant's truck as he attempted to go around the parked truck.

The annotation in 172 ALR 736 discusses "Reciprocal duties of driver of automobile and bicyclist or motorcyclist."

Pledge — *securing gambling debt.* The Ohio Supreme Court in Gehres v. Ater, 148 Ohio St 89, 172 ALR 693, 73 NE2d 513, opinion by Judge Hart, held that a purported pledge of a municipal bond to secure payment of a gambling debt is ineffectual for want of a valid consideration and gives the transferee no title or interest whatsoever in the bond.

The annotation in 172 ALR 701 discusses "Rights and remedies in respect of property

"I told him marriage was founded on trust, and he ought to start a trust fund for me."

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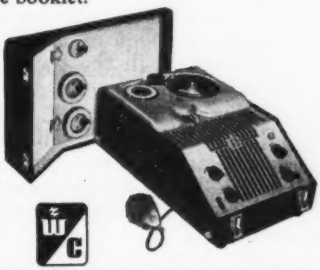

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pledged for payment of gambling debt."

Specific Performance — *purchase of home on Sunday.* An interesting discussion on the effect of Sunday laws is contained in Chadwick v. Stokes, 162 F2d 132, 172 ALR 405, opinion by Circuit Judge Biggs. It was held that the purchase of a home for one's family is not a "worldly employment" within a Sunday observance law prohibiting "any worldly employment or business whatsoever" on Sunday.

The annotation in 172 ALR 411 discusses "Enforceability of contract made on Sunday for purchase of home."

State Courts — *power to refuse to enforce OPA statute.* The U. S. Supreme Court, in Testa v. Katt, 330 US 386, 172 ALR 225, 91 L ed 967, 67 S Ct 810, opinion by Justice Black, held that the OPA must be enforced in state courts. The basis of the decision is that the supremacy clause of the Federal Constitution precludes state courts from declining to entertain an action to enforce a valid penal law of the United States.

The annotation in 172 ALR 231 discusses "Enforceability of Federal penal statutes in state courts."

Statute of Limitations — *pleading failure to discover fraud negativing defense of limitations.* In Schulte v. Westborough, 163 Kan 111, 172 ALR 259, 180 P2d 278, opinion by Justice Wedell, it was held that the plaintiff must, in his petition in an action for fraud, in order to toll the statute of limitations on the ground of his failure to discover the fraud complained of, allege facts which clearly disclose that the fraud was first discovered within the period of time fixed by the statute of limitations for commencing actions for fraud.

The annotation in 172 ALR 265 discusses "Pleading avoidance of delay in discovery of fraud in order to toll statute of limitations."

Tax Title — *acquisition by tenant.* The Washington State Supreme Court, in Holzer v. Rhodes, 24 Wash2d 184, 172 ALR 1173, 163 P2d 811, opinion by Grady, J., held that a tenant who is under legal or moral obligation to pay taxes against the demised premises will not be permitted to assert a tax title adverse to his landlord under a tax sale brought about by his own fault or neglect in the payment of taxes.

The annotation in 172 ALR 1181 discusses "Right of tenant, as against landlord, to acquire or assert title based on foreclosure of lien or sale for tax or special assessment."

Trusts — *trustee's discretion as to bestowal of benefit.* Attorneys for banks and estates will be interested in the case of Nicholson's Estate, 355 Pa 426, 172

ALR 450, 50 A2d 283, opinion by Justice Allen M. Stearne. It is there held that generally, if payment to a beneficiary of a trust is left to the absolute discretion of the trustee, ownership of the fund is not in the beneficiary, since he may receive only what the trustee thinks fit to give.

The annotation in 172 ALR 455 discusses "Discretion given trustee respecting payment, application, or distribution of income or corpus as conditioning the gift itself, or as governing merely the time or method of permitting enjoyment."

Trusts — *trustee's right to employ assistants.* An unusual provision in a trust instrument was construed in Re Butler, 223 Minn 196, 172 ALR 977, 26 NW 2d 204. In an opinion by Justice Matson it was held that trust provisions authorizing the trustee to employ such clerks and other persons as it may deem requisite for the proper and convenient execution of the trust and that all expenses, including the compensation of the trustee, shall be paid prior to any distribution or accumulation of income or principal, do not, in the absence of clear and unambiguous language manifesting an intent of the settlor to the contrary, authorize the trustee to make a charge against the trust estate for disbursements incurred for ministerial services, such as those involved in the routine chore of keeping accurate and complete bookkeeping records and in preparing periodic administration accounts, which are usually and normally performed or furnished by a trustee in return for his compensation.

The annotation in 172 ALR 992 discusses "Construction of provision authorizing trustee to employ clerks or assistants."

Waters — *improvement of irrigation ditch cutting off seepage.* An interesting irrigation problem is presented in Big Cottonwood Tanner Ditch Co. v. Moyle, — Utah —, 172 ALR 175, 174 P2d 148, opinion by Wolfe, J. It was held that the right of an irrigation company to improve and waterproof its irrigation ditches running across lands of a cotenant in such ditches, constituting main arteries for the conveyance of water from its source to smaller ditches used directly to irrigate the land, so as to prevent seepage of water, is not affected by the fact that such improvements will cut off previous incidental benefits to the land of the cotenant from the prior seepage which enabled shrubbery to grow on the cotenant's land along the ditch, since this does not affect his right as cotenant in the ditch.

The annotation in 172 ALR 193 discusses "Right of owner of easement to alter its use in such away as to deprive servient estate of an incidental benefit."

Wills — *stock issued as dividend.* The effect of a stock dividend on the provision in a will is discussed in Butler v. Dobbins, — Me —, 172 ALR 361, 53 A2d 270, opinion by Justice Thaxter. It is there held that a specific bequest to each of the testatrix's deceased husband's two daughters of "twenty-one shares of the capital stock held by me" in a named bank, of which the testatrix owned sixty-five shares, followed by a residuary clause in favor of the testatrix's brother, shows an intention to give one third of her interest in the bank to each of the daughters and to brother and entitles each of the daughters to her proportion of a stock dividend declared on the stock four years after the execution of the will and nine months before the death of the testatrix.

The annotation in 172 ALR 364 discusses "Right of specific legatee of stock to stock issued as dividend, or upon split-up or change of par value, before testator's death."

Witnesses — *taking testimony through interpreter.* An interesting trial question appears in the case of Prokop v. State, — Neb —, 172 ALR 916, 28 NW2d 200. Justice Paine wrote the opinion. It was held that no prejudice results from the taking through an interpreter of testimony of one who later proved able to testify in English where, as corrected by the trial court who understood the language of the witness, the testimony so taken gave to the jury a fair and unbiased version of the answers made by the witness.

The annotation in 172 ALR 923 discusses "Use of Interpreter in court proceedings."

Workmen's Compensation — *injuries while performing services for private benefit of employer.* Employers should not use their employees for their own personal work, at least without additional insurance coverage. It was held in Phillips v. Industrial Commission, 390 Ill 335, 172 ALR 372, 61 NE2d 681, opinion by Chief Justice Fulton, that one doing janitor and maintenance work in a printing shop, in which capacity he was within the coverage of the Workmen's Compensation Act, who, when not busy there, did yard work at the premises of his employer, is not entitled to compensation for an injury sustained while trimming trees at the residence, where the statutory definition of "employee" as used in the Workmen's Compensation Act excludes "any person who is not engaged in the usual course of the trade, business, profession or occupation of his employer."

The annotation in 172 ALR 378 discusses "Workmen's compensation: coverage of industrial or business employee when performing, under orders, services for private benefit of employer or superior, or officer, representative, or stockholder of corporate employer."

The Recording of Deeds in the Colony of Massachusetts Bay

By MARK DEWOLFE HOWE

Member of the Boston Bar, Professor of Law, Harvard Law School

Condensed from Boston University Law Review, January, 1948

PROFESSOR Beale and Professor Haskins have suggested that Massachusetts may claim the distinction of having originated, for this country, the modern system of recording deeds of conveyance. Professor Beale's examination of the recording statute enacted by the General Court in 1640 and of the amendments adopted during the later Colonial period, led him to the conclusion that a recording system, substantially similar to the modern scheme, has been continuously in force in Massachusetts since 1640. He pointed out that the original statute contained all of the features essential in his eyes to the modern recording system; it provided that the deed should be acknowledged before a public official and that the whole deed, and not merely a memorandum of its contents, should be put on record. Furthermore, though the act as read by Professor Beale assured priority of right to the first of several grantees who recorded his instrument of conveyance, it envisaged the passage of title, as between grantor and grantee, at the time of conveyance and not at the time of recording. Both Professor Beale and Professor Haskins were careful to distinguish the Massachusetts statutory scheme from a procedure designed only to prevent fraudulent conveyances. In this footnote to the work of Beale and Haskins I shall accept their premises with respect to the essential elements of a recording system.

A re-examination of the records of the General Court and of the House of Deputies leads me to believe that Professors Beale and Haskins have disregarded important portions of relevant statutory materials. Although their analysis of the

basic act, the statute of 1640, is exhaustive and accurate, they have, I believe, either overlooked subsequent amendments, or misinterpreted their significance. The justification for their claim that the 1640 act was designed to achieve something much broader than the prevention of fraudulent conveyances is found in its opening provisions. It reads as follows: "For avoyding of fraudulent conveyances, & that every man may know what estate or interest other men may have in any houses, lands or other hereditaments they are to deale in, it is therfore ordered, that after the end of this month no morgage, bargaine, sale, or graunt hearafter to bee made of any houses, lands, rents, or other hereditaments, shalbee of force against any other person except the graunter and his heires, unlesse the same bee recorded, as in hearafter expressed: And that no such bargain, sale, or graunt already made in way of morgage, where the graunter remaines in possession, shalbee of force against any other but the graunter or his heires, except the same shalbee entered as is hearafter expressed . . ." Comparing these clauses, and the balance of the statute, with the Massachusetts recording act as it appeared in the Revised Laws of 1902, Professor Beale found no significant differences, and he suggested that "considering that the act has passed through twelve revisions and has been amended at least twice, the language is very close to the original." What is misleading in Professor Beale's account of the legislation is his total unconcern with the amendments which occurred shortly after 1640.

In the Laws and Liberties of 1648 the substance of the earlier provision concerning the recording of deeds appeared under the general title "Conveyances Fraudulent". Most of the changes in the wording of the original statute were merely structural, not changing the sense of the act. One significant change, however, was made; the equivalent of the opening passage in the act of 1640 quoted above read as follows in the 1648 revision: "That after the end of October 1640 no morgage, bargain, sale, or graunt made of any houses, lands, rents or other hereditaments *where the Graunter remains in possession*, shall be of force against other persons except the Graunter and his Heirs, unles the same be acknowledged before some Magistrate & recorded as is heerafter expressed." The italicized clause, thus appearing for the first time in the Laws and Liberties of 1648, was included in all subsequent revisions during the Colonial period. Professor Beale cannot, of course, be charged with a negligent oversight in his failure to notice the change as it appeared in the 1648 Code, for it was not until 1929 that that

book of laws became generally accessible to scholars. It is surprising, however, that he failed to notice the same clause as it appeared in the revisions of 1660 and 1672. The amendment is of fundamental importance, for it indicates that from 1648 on, recording of a deed was required only if the grantor of the land remained in possession. Professor Beale, in discussing the recording system of Colonial Virginia, pointed out that the system in force there required recording only if possession of the land was not transferred to the grantee. Since in those circumstances a conclusive investigation of title could not be made at the registry, he considered that an essential element of the modern system of recording was lacking. The clause in the Massachusetts Act, apparently added in 1647 or 1648, seems clearly to have been equivalent to the Virginia provision.

The legislative history of the amendment is characteristically obscure. There is no indication either in the Records of the General Court or in those of the House of Deputies, of its source or occasion. This gives some justification for the possibility that it was inserted more or less casually in the course of revising prior legislation for inclusion in the Code of 1648. If that was the case, it seems probable that it was not considered to alter the substance of the original act but merely to clarify an ambiguity. Certainly there is some uncertainty as to the meaning of the original statute, for the 1640 provision, already quoted, in which the requirement seems to have been laid down that *all* future conveyances and mortgages should be recorded, was followed by the explicit provision that all mortgages previously made should be recorded only "where the graunter remains in possession". A distinction, of course, might have been intended between future sales and mortgages on the one hand and past mortgages on the other, but the drafting of legislation was customarily so inartistic that one suspects that the 1648 amendment merely states clearly what had always been intended. Whatever may have been the meaning of the Act of 1640, however, the provision in the Code of 1648 makes it abundantly clear that recording would thereafter be required only if the grantor remained in possession.

One subsequent amendment of the act deserves mention, partly because of the example which it affords of the difficulties in interpreting the statutes of the Colonial period, and partly because of the light which it throws upon Colonial conveyancing procedures. It is an amendment to which Professor Beale again paid no attention and the significance of which Professor Haskins seems to have overlooked. The Records of the Gen-

eral Court for October 19, 1652, contain the following entry: "Whereas the way of the passing of howses and lands by sale in England is both peaceable and effectuall, namely, by deed, in writing, sealed, and deliuered with liuery and seizin, or possession given of the same before wittnes, or by deed acknowledged and enrolled, or by sueing a fine, and that diuerse within this jurisdiccon are apt to rest vppon a verball bargajne, or sale, for howses or lands of any valew, this Courte, taking this thing into serious consideratjon, doth heereby declare and order, for the preventjon of all clandestine and vncertajne sales and titles, that henceforth no sale or alienation of howses or lands wthin this jurisdiccon shallbe holden good in lawe, except the same be donne by deede, in writing, vnder hand and seale, and deliuered and possession given vppon parte in the name of the whole by the vender or his atturny, so authorized, vnder hand and seale, & vnlesse the sajd deed be acknowledged according to lawe, and recorded." Had this statute superseded the earlier recording act as it appeared in the Code of 1648, there would be good ground for arguing that at least after 1652, if not earlier, a full-dress recording system of the sort which Professor Beale had in mind, was part of the Colonial system. There are, however, three difficulties. First, the Records of the House of Deputies for October 19, 1652, in recording the same enactment, leave out the ampersand in the closing phrase: "& unlesse the sajd deed be acknowledged according to lawe, and recorded". Without the conjunction it would appear to be arguable as a mere matter of grammar that recording is only required if there is no livery of seisin or transfer of possession. If that interpretation were accepted, the act of 1652 would seem to leave the responsibility for recording deeds of conveyance substantially as it was under the Code of 1648. The amendment so read would not alter the existing system, it would merely serve to make it clear that thenceforth every conveyance must be evidenced by a deed—the deed to be recorded if the grantor remained in possession or if he omitted the ritual of livery of seisin.

All other things being equal, one should probably accept the records of the General Court as more accurate than those of the House of Deputies and say, accordingly, that the closing phrase in the 1652 statute required that all deeds of conveyance should be recorded. Given that equality, the Beale-Haskins thesis, though false as of 1648, might be true as of 1652.

Know Your Judge

By EVO DeCONCINI
Attorney General of Arizona

ONE time while I was Judge, I was at the far end of the stacks in the library. I had a big law book in front of me, and a copy of the "Reader's Digest" behind it. A man in my position has to be well-read. As a matter of fact, nowadays when a client goes to see either his doctor or lawyer he goes in with the Reader's Digest in one hand and the Saturday Evening Post in the other. And woe to him if he doesn't give the right answers. Well, while I was improving my condition for my future life, two lawyers came in. A little eavesdropping now and then is O.K., when they sneak up behind you that way. My name was mentioned. They were discussing their troubles and the God blessed judges. My name was mentioned again. One lawyer was nearly uncontrollable in his damnation. The other had weak praise for me. The first one said, "Well, you can praise him, because you always win your cases, while I read him twenty cases in point then he rules against me." The second one said, "That's your mistake. You cite and read him twenty different cases. I cite him one case, read it to him twenty times, he understands it and I win." So the first thing, you see, is to measure the Judge's intellect.

Secondly, there is his vanity. Be not ever unmindful of that! Don't insult the Judge. Yessir, don't overlook that it is more profitable to win your case, than it is to have your fun and lose your case.

You remember old Mr. Tutt, Arthur Train's famous character. As a boy he used to "tickle trout". Shakespeare said in Twelfth Night, Act 2, Scene 5, line 24, "Here comes the trout that must be caught with tickling." Here is how he did it. The trout would sometimes suspend themselves in a not too swift current and be "balanced trout." Lying flat on his belly with arms overhanging he would lower his hand in the water and slowly move his hand forward and stroke the water beneath the gills and belly. Gradually his hand would practically stroke the trout's body and with a sudden clutch he would yank it out of the water. I've never tried it, but he claims to have done it many times. He also used it on Judges.

Now, that you know how to tickle a trout to his disadvantage, you must try it on a Judge. Once you have him tickled into docility you are an accomplished lawyer. Here is how you do it. Of course you must do it so he is not aware of your nefarious scheme, to say nothing of your adversary, but if the latter knows it, you may even enjoy it more.

The first move is a slight bow, from the waist, with a friendly smile. Secondly, a smile of appreciation at a ruling he just made. Third, refer to some recent decision of his, whether it's law or not, then citing some case he was affirmed in or some other tribute to his past legal prowess, and finally a not too obvious appeal to his generous heart, his kindliness as a man and his great philosophy of life.

It's foolish to antagonize a Judge. You have everything to lose. Let him argue with you, don't argue with him. Don't show him up in open court. Delay your killing argument until later, after he has quit talking. Remember, Judge and lawyer are cut from the same cloth. Yet their functions are different. The lawyer is standing, the Judge is sitting. The lawyer is talking, the Judge is listening. The lawyer is emotional, the Judge is docile. The lawyer is prejudiced, the Judge is unbiased. Therefore you must measure the man with the position he has. Keep your argument sufficiently interesting so the Judge doesn't fall asleep. Save your invectives for opposing counsel; the Judge may agree with you and his joy will know no bounds.

When you object, do so in a not too deprecating manner as far as he is concerned. After all, he is human and has his domestic troubles as well as legal.

JURY

Know your jury. That's a big order. We hardly ever have time nor do our cases warrant an investigation of each juror.

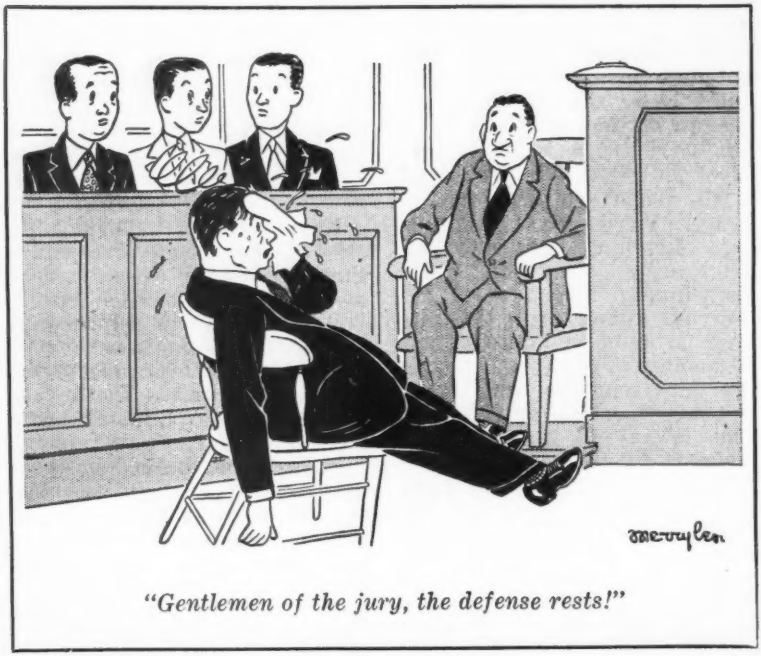
When examining a juror in a criminal case, don't ask every juror if he was ever arrested on a felony charge, as one lawyer did in my court. In making a plea to the jury don't refer to them as "solid-headed business men"; some of them may be soft and resent it. Don't disgust the jury by always referring to their intelligence. After a panel hears this two or three times in each case, they begin to think everyone is kidding them.

Don't alienate the jury by arguing with the Judge. After all, the average juror really believes that the Judge knows the law. It has been said that a Court consists of twelve ordinary morons presided over by one high-class moron. Whatever your opinion might be, remember the jurors don't think that's true.

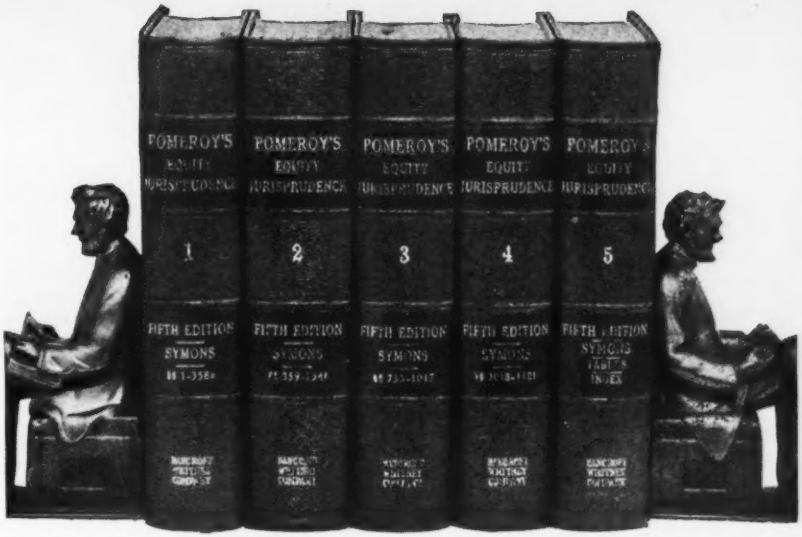
In my own cases, I have often thought the jury was right but their verdict was too small. In Pima County our jurors are property conscious. They do not give other people's money away with abandon. If anything, they are penurious.

Judges, as a rule, are conservative because the doctrine of stare decisis makes them look backwards. They are property conscious too; but today liberal minded men are taking to the Bench as well, and I believe that all in all any litigant can get as fair a trial before a Judge as he can before a jury.

All that I can see that the jury system adds to court procedure is that it slows it down and makes the Judge work harder,



"Gentlemen of the jury, the defense rests!"



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but saves him from making most of the decisions.

As I said before, I'm not against the jury system and I intend to use it. The good lawyer will know when to have a jury and when not to; but not even the best lawyer will be right every time.

Some lawyers just shine before juries, whereas the Judge may think them commonplace.

A certain lawyer in Los Angeles always wants a jury. He stumbles through the first part of his case and the jury feels sorry for his client and are behind him from the start. Little by little he improves. The jury feels they have their money on a winner. He is winning and they think they helped him. When he crosses the finish line they are there cheering and waiting for him.

Some people think the jury system is the Flag of Freedom, if so, "Long May It Wave."

YOURSELF

The Judge and Jury are important; but most of all is the lawyer and that's *you*.

As Shakespeare said, "To thine ownself be true and it must follow as the night the day that thou canst not be false to any man."

The New Testament said, "Know thyself."

No one has argued with Shakespeare for years. As far as good advice is concerned, no one can argue with the words "know thyself." Just take it literally as far as your stomach is concerned, and you will see what I mean. Now when you take it as far as your mind is concerned, I will say the man who truly knows himself is a lucky man indeed.

In this day of psycho-analysis we may have a better chance to know ourselves. It's surprising how many people resort to that treatment and the relief they get. However, if you try it don't be disappointed if you only find out that at the age of four you were either in love with your hobby horse or your sister's doll and not the little girl next door as you supposed.

Take the proposition of being your own witness. When I was in the Attorney General's office, we were liquidating defunct banks and building and loan associations. It was customary for attorneys to be witnesses because we knew more about our cases than anyone else, and cases were practically all defaults. That got me into a bad habit. However, I had it cured in one case. The lawyer on the other side took the hide off of me. I lost the case. I didn't quit smarting until the Judge gave me a new trial because of an erroneous instruction to the jury.

A lawyer in Tucson once took the stand in his case. When he asked his own name he answered it. When he asked himself the next question, counsel objected

to it on the ground that the witness didn't understand the question.

One day I was hearing a default divorce case. The lawyer said one of his witnesses was late and he himself would testify.

He took the stand first and told how he and his client went down to a downtown hotel one night and went up to a room and found the client's husband in the room in a semi-compromising condition with another woman; there was other evidence of an illicit love affair going on as well as half-filled bottles of liquor, beer, soda, etc.

The plaintiff then took the stand and corroborated her attorney's testimony.

I didn't want to grant that divorce. I felt that attorney had no business getting his evidence that way and then testifying himself. Bad enough if he engineered it or discovered it but to testify himself, that was too much. However, I had no alternative. He met the requirements of the law, so I granted the divorce.

The only way I salved my conscience about it was, later I learned, he just recently had been discovered by his wife and arrested for being found in a similar situation himself. That evened up the score because at least he was an expert witness.

Don't be afraid to talk about the Judge if he rules against you. As a matter of fact, if he is no good he ought to be talked about so the electorate will replace him at the next election. However, if you are peeved at him for ruling against you, your license to damn him is only good for twenty-four hours.

At a bar convention in Phoenix, a lawyer asked a Tucson lawyer if I was any good. The Tucson lawyer was too smart to commit himself and answered "Why?" "Well," the Phoenix lawyer said, "I was down there and argued for two hours and DeConcini never did know what the hell I was talking about." My first reaction was to go home and promptly rule against him, but I had already decided to do that so I had to go over his whole brief and points of law again. Now it wasn't as bad as he said it was. He and I didn't agree. He should have had his argument in a more convincing form. When a lawyer has the goods it's up to him to deliver.

Always write letters to the Judge. It may provide him with material for a bar luncheon talk. Some witnesses and litigants think if they can just talk to the Judge, that is "hot stuff" and the case is in the bag.

Here is a letter I received from a lawyer concerning a very important case involving a contested will. This lawyer was known to write his pleadings in poetry on occasion. He was a

Stanford man. The only contact I ever had with him was this letter.

I'll read it to you:

".....", Ariz.
Feb. 3rd 1942

SUPERIOR COURT
Tucson, Ariz.

Your Honor—

I have received a subpoena to testify in the legal action involving the estate of John Doe, God says that I am not familiar with Doe's private life to be able to testify intelligently.

God says that the aforesaid John was a polygamist, and that his offsprings by consanguinity are his legitimate heirs, and none others, for whose maintenance he refused and failed to provide.

As to the mothers of these numerous bastards, God says that they were accomplices of John in the commission of hedeous offences against the laws of God, of the laws of nature, and of the laws of the State of Arizona, that they were guilty of Adultery, Seduction, and Fornication which are offences against the State of Arizona, and that to give them any portion of his estate would be to foster, foment and encourage the commission of such criminal offenses, and which no magistrate is justified to sanction.

Hence, it will be up to the court to investigate, analyze, and criticise God's ascertions, if they see fit to do so. As to me, I have no interest in the outcome of this litigation, because I do not expect to receive any substancial sum of money from the aforesaid estate. Therefore, in view of my Super-human information, which I believe to be true and correct in every particular, I wish to be disqualified to testify in the premises.

That is all, and whether you give this letter the attention it deserves or not, I thank you.

Yours truly,
/s/ (name withheld)
God's Humble Servant."

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Condensed from Cornell Law Quarterly, September, 1947

The Argument of an Appeal

By JUDGE RAYMOND S. WILKINS

Associate Justice Supreme Judicial Court of Massachusetts

LET us begin with a few words about the record, which is, or should be, the tangible reproduction of the case. In my State the printing of the record is in the hands of the clerk. What it should contain is settled by statute, by rule of court, and by decision. It is most prudent, however, to confer with the clerk to make sure that the record contains everything that one is entitled to have included, and, what is equally important, that it is not cluttered with anything which there is a right to have omitted and which neither counsel intends to use.

Once the record is printed and received, counsel must adhere to the fundamental rule which permeates the whole subject of appeals: Know the record! Its substance must be mastered in order to prepare the brief, and, for the most effective oral argument, this mastery must be retained and alertly supplemented by a geographical familiarity—that is, by page and line—with its every nook and cranny as perfect as was the knowledge of Nydia of the smoke and cinder filled streets of Pompeii.

The brief should be drawn with an eye toward creating a favorable first impression in the judge's mind. It should be able to weather oral assault by an opponent, who will surely have read it before the arguments. It should contain everything which is worth arguing in the case, and should cover with finality questions like those of evidence, which can at most merely be adverted to orally. On the other hand, whatever, upon mature deliberation, is considered unworthy of argument should be frankly and expressly waived. This was Abraham Lincoln's method, and it was a good one. It is a practical recognition of the rightness of Cardozo when he wrote, "Analysis is useless if it destroys what it is intended to explain."

The statement of facts should be succinct but at the same time full and complete as to the material issues. Such a statement is not easy to prepare, but it probably is the most important single thing appeal counsel has

to do. Facts tend to complexity and often are double-edged blades. Two great figures, one in English, and one in American, literature, were both right, when they respectively said many years apart, "Facts are stubborn things," and "Facts are contrary 'z mules."

If a statute, city ordinance, town by-law, or rule of some court or administrative body is involved, it should be quoted accurately and in full. The places in the record where the questions of law arose should be meticulously cited. The newspaper headline format is out of place and constitutes self-confessed ineffectiveness of expression. The brief should be logically arranged by topic with reasonable citation of authorities, so that, when the three foxes sooner or later appear, the judicial huntsman will not lose too much time in hurdling any hedges in the reasoning, or be led off the scent through citations which may not be in point or which may be unreasonably numerous or incorrectly given. The citations should be selective and support the respective propositions of law.

I do not believe that the brief can be proofread too often or too carefully. It should be checked with the record and with the original law reports, not with your own draft. Such reading crystallizes knowledge of the issues. It is the best preparation for the oral argument. And it should utterly eliminate typographical errors. One or two undetected misprints may be excusable in these days of postwar printing, but any considerable number tends to destroy confidence in the substance of the brief itself and in the conscientious thoroughness of its preparation.

The other weapon of contending counsel on appeal, the oral argument, affords a great opportunity. It is a mild euphemism to aver that this opportunity is sometimes not fully realized. Appellate argument resembles general literature. Almost anyone has some critical competence, but only the few achieve a standard of performance which the many sense. Although appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole.

Counsel should never forget and in their arguments try to enlist the sympathetic interest of their fellow humans, the judges. This calls for a supreme effort to make the presentation as attractive as possible, both in substance and in form. The vital point or points should be exposed and attacked incisively. This calls for careful deliberation in advance. The manner of speaking should be varied to attain the proper degree of impressiveness. A monotonous in-

tonation should be avoided. In this connection it is constructive to think of the baseball pitcher who has a good change of pace.

Counsel wants the court to understand the case, and, at the same time, to understand it his way. The right method of doing this is simple: Tell the judges about it. Give them the facts, and begin by giving them the facts. The very first sentence should focus attention upon the general nature of the controversy. It should settle, once and for all, whether the subject at hand is a murder, a taking by eminent domain, a divorce, or the application in a will of the rule against perpetuities. No matter how interesting — to counsel—the points of law may be, they should be merely indicated and not argued until the essential facts have been stated, even if this requires reliance upon the brief for much of the law. This means that there should be a budgeting of the allotted time and, except in emergency, a rigid adherence to it.

To the court every new record is a mystery. Sometimes it is also a labyrinth. Whatever their legal qualifications judges usually are neophytes as to the facts of a particular case. In my experience it is seldom that there has been an opportunity before the arguments to study the records or the briefs. Even on rare occasion when a judge is able to do this, he does not acquire from the cold record the grasp of detail and the perspective of the facts which counsel always should, and usually do, possess.

A statement of facts should contain the facts, all the facts, and nothing but the facts. Statements off the record are just as bad in the oral argument as in the brief. The inevitable dénouement may or may not be close at hand, but its effect, whenever it occurs, will be equally baleful. Equally devastating is the suppression of a vital fact. In a certain case of the Sherlock Holmes type, the defendant's counsel argued his full time without mentioning anything remotely connecting his client with the crime. The presentation differed from Poe's truncated *Murders in the Rue Morgue* only in not being admittedly fragmentary. The prosecuting attorney in a few moments then supplied the omissions which rendered the whole evidence as cogent as that which satisfied Robinson Crusoe that he was not alone on the desert island. A delay of one hour in the full exposure of the facts is hardly worth while. To entertain an expectation that such exposure may not occur is sheer chauvinism. There was a wise saying in the Field Service Regulations of the United States Army which went something like this, "Always attribute to the enemy the same intelligence as your own even though he may not possess it." This is equally ap-

plicable to an argument on appeal. I believe it must have been this sort of thing which Thomas More had in mind when he wrote in his *Utopia,* "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."

An inevitable and valuable part of the arguments is the questions by the court. Although often so regarded, they usually are not a manifestation of unfriendliness.

Questions by the court most often spring from a yearning for the facts. They sometimes are means of communication to a colleague on a distant part of the bench, perhaps in reply to a question of his to counsel. In the main, they serve to advise the advocate of the issues to which at least one judge is directing his attention, and as such are a coöperative effort to make the best use of time, and thus expedite a just determination of the cause.

It often happens that a question is asked which relates to a matter which counsel intends to consider at a later point in his

"Maybe by <u>your</u> feet I'm within twelve feet of the hydrant, officer—but not by mine!"

argument. The best way to handle the situation is for counsel to state briefly what the answer is to be and say that he will cover the matter more fully before he closes. But should he follow this course, or should he feel that to give an answer on the spot would require too long a digression and that he wishes to be excused temporarily from answering, under no circumstances should he omit to carry out his promise. To fail in this respect evokes judicial speculation as to the reason. Was it an oversight? Was it ignorance? Was it evasiveness? Or was it something else? And if so, what was it, and what is its bearing upon the merits of the case?

One situation which occasionally arises in questions from the bench is beyond the control of counsel. It may be that a judge may put a formidable question before counsel scarcely has begun to speak or to have had a fair opportunity to state his position. In that unfortunate plight the most that counsel can do is respectfully and tolerantly make the best answer he can, and trust to good fortune that he will be able to resume stride without losing too much precious time.

I have a few favorite "Don'ts." The brief reader may be dismissed with an anecdote. Wearied by the futile consumption of time by a lawyer who was droning through his brief, a helpless judge wrote on a piece of paper, "A brief reader is the lowest form of living animal," and then passed it to a colleague. The latter read it, took a pencil, wrote, "He is a vegetable," and passed it back.

A brother of the half-blood to the brief reader is the counsel who instead reads a prepared statement. The only difference to be observed is that it is harder to guess the probable length of the ordeal when, unlike with the brief, there is no copy in one's own hands. Regardless of what is read, the very act of reading draws an iron curtain between counsel and the sympathetic attention of the court.

Do not relate the facts of cited cases in painful detail. They are too many to be absorbed from oral presentation. It wastes time that can be utilized to better advantage. In the average case it is sufficient to announce that you rely on such and such cases. The court, before deciding the case, will read them just as carefully as have counsel if they are even remotely material to the reasoning of the opinion.

One should never volunteer the statement that he did not try the case below. It is at most a defensive remark, and is too suggestive of "*Sauve qui peut.*"

If extra time is allowed for the argument, this should not be regarded as an offer by the court to a unilateral contract to be accepted only by a speaking performance which persists till the

last grain of sand has run out of the hourglass. The words that remain unspoken under such conditions beget much good will, particularly with the attending members of the bar awaiting their turn to address the court. This principle applies to all arguments. In an earlier court generation one youthful counsel, who asked how much time he was permitted, was told, "You have half an hour to talk, but you do not have to talk half an hour."

It is just as important to close as it is to open. The argument should not be a one-way ticket to nowhere. Upon reaching the predetermined destination, one should alight. In other words, he should make clear his final point, stop talking, and be seated. And in so doing expressions of gratitude or thanks to the court for their attention are most unhappy. Such a rhetorical anti-climax is, at best, none too pleasing to the judicial ear. Some years ago such a conclusion more than once evoked a judicial reminder that listening was the very minimum of the duties of the office to the faithful performance of which all the members had been duly sworn.

There is sometimes the problem whether to argue orally or to submit on briefs. If the record is complicated, my advice is not to lose a golden opportunity to set forth the facts in the presence of those who must understand them before they can decide the case. If the record is not complicated, and if you prevailed in the court below, and if your opponent is going to submit, it may be wise to rely on your brief provided you are still satisfied with it. But if you were unsuccessful below, or if you were successful and your opponent is going to argue orally, it is my belief that allegiance to the cause calls for oral argument on your part. General rules without exception applicable to every case can not be laid down, and what I say is only the view of one judge of one court, and not the result of any Gallup poll.

Trouble in Utopia

Harvey Humphrey tells this one:

One day an inspector of tenement houses found four families living in one room, chalk lines being drawn across the floor so as to mark off a quarter for each family. "How have you been getting along here?" inquired the inspector.

"Very well," was the reply, "until the lady in the far corner began to take in boarders."

—*L & R News.*

The Jury Looks at Trial by Jury

FROM

Journal of the American Judicature Society, December, 1947

This paper was prepared by George Brand, Jr., George Wright and Richard E. Sieswerda, University of Michigan law students, as a project in a 1947 summer session course in judicial administration taught by Professor Maynard E. Pirsig, visiting professor from the University of Minnesota.

SINCE the American judicial process arrived at the age of introspection, the value of the common law jury trial has been the center of dispute and conflict. It has been attacked on one hand as slow and inefficient, and praised on the other as the citadel of civil rights. Professors of law, lawyers, disappointed litigants have all had their say, yet strangely enough, the only large group of people who have had a full opportunity to observe the innermost workings of the system do not seem to have expressed their views—the jurors themselves. This study was made to sample their views.

On August 1st, 1947 a questionnaire was mailed to 300 jurors who had served on the Federal District Court at Detroit during the 1945 and 1946 terms of that court. The query covered three legal pages, and consisted of forty-two questions, each of from one to six parts, which could be answered by indicating "yes" or "no" in the appropriate space provided. Of the 300 questionnaires mailed out, 153 replies were received and tabulated at the time this study was written.

The questions were arranged around the following subject headings:

1. The experience and opportunity for observation of the persons polled.

2. The physical surroundings and the environment of the courtroom. The writers felt that it was not only important that the juror have the feeling that the courtroom was a place in which the work of justice was carried on, but also that the environment of the courtroom should have the effect of impressing the juror as a place fit for the process of justice.

3. The function and efficiency of the principal personalities in the administration of justice: the judge, the attorneys, and, to a lesser extent, the witnesses,

minor court officials and the jurors themselves. The writers had some curiosity as to the character given to these personalities in literature and the motion pictures—the overly technical judge, the browbeating attorneys and the casual clerk of the court who is often portrayed as administering the oath with tongue in cheek.

4. The system of justice, its end product in terms of just results in the cases heard, and an evaluation of our jury system in the terms of its probable cost in time and money; with a consideration of possible improvements by means of such alternatives as the administrative tribunal or court investigators.

There is no doubt in the mind of the writers that jurors have opinions on these matters, as is evidenced by the fact that more than 50 per cent of those polled replied. It was interesting to note that those opinions were definitely expressed and for the most part with great unanimity by the jurors.

The Experience of the Jurors Polled

There is little evidence that any of the jurors polled were what may be termed "professional jurymen." The average juror had served one and one-half terms and had heard three cases, one criminal trial and two civil actions. The veteran of the group had served five terms of court and had heard 80 cases according to his estimate. He indicated that he had heard many more in the state courts, and stated that he had heard 34 criminal cases and 19 civil actions in the federal system. This juror was in a class by himself, as the average would indicate.

Although no question was asked on the subject, two jurors volunteered the belief that the terms of jury service should be extended to five or six months, since they felt that they were dismissed just as they had acquired a skill in the fact finding process.

Physical Surroundings and Environment

The jurors were asked if the courtroom measured up to their expectations of what a courtroom should be like, and all replied that it did. Next, they were asked whether, based on their experience, they thought it to be adequate in respect to its size, quietness, dignity and comfort as suitable to the administration of justice. Aside from

nine suggestors of air conditioning, and two who felt that additional waiting rooms should be provided for the jurors who were waiting to be called, and one who wished to see the use of women bailiffs to attend to the needs of women jurors, all those queried felt that the courtroom was adequate in every respect. It is questionable whether such unanimity would be found among jurors who had served in some of our dilapidated and poorly designed courtrooms.

The jurors were then questioned as to the manner in which the court was conducted by the various actors who administer the judicial process. The opinion was almost unanimous, that, considering the amount of business handled, the court was conducted with sufficient dignity (142 to 11) with sufficient attention to each problem (153 to 0), and with reasonable efficiency (153 to 0). There was likewise complete agreement that proper dignity and efficiency was displayed by the judge and the one who administered the oath. Likewise, there was substantial agreement that the jury itself was well-behaved (136 to 17). Concerning the lawyers there was some disagreement. The vote was, however, 97 to 56 in their favor. This was less flattering than a similar split on the conduct of witnesses of 102 to 41. Considering the amount of business handled, only 11 jurors thought that any shortcomings could be remedied by the judge; while 30 thought that the lawyers could do something about it. The replies, however, were all but unanimous to the effect that the shortcomings had no effect upon the decisions reached in the cases heard (149 to 4).

The Principal Personalities

The first principal actor considered was the judge. There was almost complete approval of the federal court judges. In the words of one juror, who was deeply moved: "The dignity, fairness, knowledge of the law, patience, and understanding shown by our federal judges make an American and a juror feel a deep sense of gratitude to God to be born in a country where everyone has a chance to be fairly and justly dealt with."

All agreed that on their first impression the judge looked and acted like a judge, and further, after they had served, that the judge was fitted for his job (147 to 6), fair and unbiased (148 to 5), and considerate of the participants and their problems (148 to 5).

The report on the lawyers was also favorable; in ability the jurors felt that the lawyers on each side were about equal (143 to 10), although, most of them also felt that the ability of the lawyers affected the decision in the case (141 to 12). Concerning the sincerity of the lawyers, the jurors were asked if the average lawyer honestly be-

lieved in his own case; 89 said "yes" and 64 said "no." Most jurors (137 to 15) believed that this did not affect the decisions. One pointed comment was: "Some lawyers could not possibly have believed in their case." However, there was unanimous agreement that the average lawyer had acted fairly to his own client (152 to 0), to the judge (152 to 1) and to the jury (152 to 1). Most agreed that he was also fair to the witnesses (138 to 12) and to the other side (139 to 14). Concerning the conduct of the lawyer, only 3 out of the 153 thought that he attempted to conceal facts which would have helped the jury decide the case correctly, only 6 that he unnecessarily bullied witnesses, and only 2 thought that he spent too much time with matters having nothing to do with the case. It was almost unanimously felt (149 to 4) that the arguments of the lawyers helped the jury to reach a correct decision in the cases.

In evaluating the function of the lawyer and his methods, the jurors thought that he relied on the facts of the case and on good argument (153 to 0), and 147 of those polled thought that he employed oratory, and only 8 thought that he relied a lot on "just talk and personality."

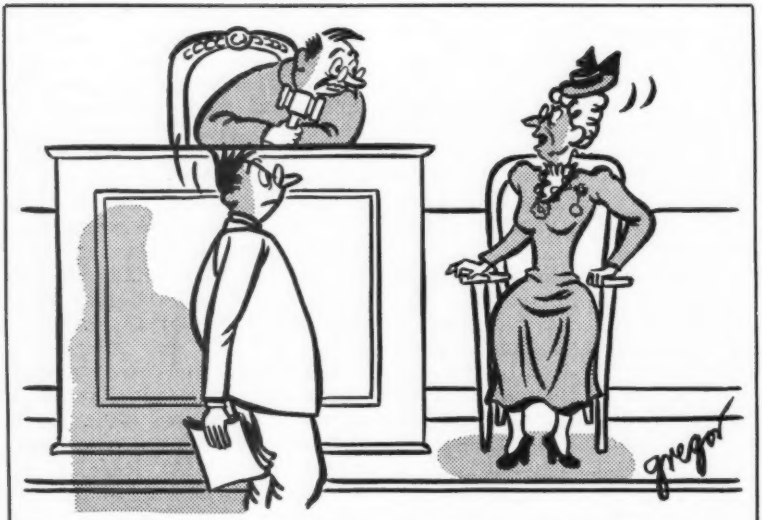
The jurors' evaluations of their own functions were also marked by a general feeling of approval. There was almost unanimous agreement that the average jury was a good one (151 to 2), that the average juror was of normal intelligence (151 to 1), and of average honesty (153 to 0). The jurors also agreed that the men jurors were better than women (149 to 4) although most of the jurors polled were women. No prejudice was shown on the subject of age, it being almost unanimous (150 to 3) that the older and younger jurors were of the same caliber. It was encouraging to note that 107 out of the 153 had a better opinion of the jury system after they had served, while 45 had the same opinion, and only one appeared to be disillusioned. We received two well-stated comments agreeing that the average juror was good, but pointing out the difficulty that could be caused by one bad member of a panel. One of these comments referred to a physical handicap of inability to hear and the other to a "sob sister soft heartedness which prevented sending even the most guilty to jail." Intelligence tests, questionnaires and class instruction for jurors were recommended.

All in all, there was almost unanimous approval of the way in which the actors in our judicial contests played their assigned parts. At least, there was a notable absence of the disagreeable characteristics that are often assigned to the judge, lawyers and juries in American literature and motion pictures.

The System Produces Just Results

In preparing our questionnaire, we sought to obtain the jurors' opinion of the adversary system or party prosecution as a means of determining the truth; the value of the system in terms of its cost; and the possibility of improvements or change to alternative systems. Since the problems are general and intangible, it is difficult to obtain an opinion by means of an objective questionnaire which calls for yes and no answers. Likewise the field lies close to prejudices in favor of traditional institutions. Because of these prejudices no specific section was assigned to achieving an answer to these problems, but the questions were worked through all of the topic headings. For example under the heading "Concerning the Judge," part of the questions were on the personal characteristics of the judge and a part were on his function in the present system, and possible alternative schemes.

The jurors believed that the present system produces just results. There were only two



"After all those questions don't I get a washing machine or something?"

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dissents to the proposition that the "decisions reached were usually just and right." In cases where they were not, the blame was apportioned as follows: no one blamed the judge; seven out of the 153 blamed the lawyers, 24 out of 153 blamed the jury. There was unanimous satisfaction with the evidence presented. All agreed that most of the evidence was on the real and important points of the case; all except two thought that it was sufficient in amount; only five thought that good evidence was kept out by too strict rules. Likewise there was almost unanimous belief (141 to 12) that the decisions of the jury were based primarily on the facts of the case. Only four jurors felt that the arguments of the lawyers were of no help in reaching a correct decision, and only one felt that the instructions of the judge were not clear and helpful.

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However, when the jurors were told that the estimated cost of a day in court under the jury system was $400.00, only six of the 153 felt that it was worth this cost to settle the dispute in most of the cases that they heard. When asked who should pay the cost, 93 favored the losing party, and 68 thought that the parties should divide the costs. Only two believed that the general public should bear this expense. In approaching the question from another angle, the jurors unanimously agreed that a jury should be called in both simple and complicated criminal cases, and all but four jurors thought that one should be called in complicated civil cases;—*yet only 13 jurors believed that a jury should be called in simple civil cases.* It should be noted that as far as the jurors are concerned, they would reverse the usual legal text-book opinion that a jury is only useful in simple civil cases and not in complicated ones. Doubtless the opinion that a jury should not be called in sim-

ple civil cases is not founded upon a lack of confidence in the jury system but upon the unimportance of the dispute in the average case and its failure to justify the expenditure necessarily involved.

Alternative Methods Rejected

The questionnaire suggested three alternatives that might be substituted for the jury system; one, the use of a court investigator who would report the facts of the case; secondly, conduct of the trial by the judge; thirdly, the substitution of an administrative board. The first of these was overwhelmingly rejected by the jurors. When asked if they felt a better decision would have been reached if a court investigator had made a study of the facts and had reported to the jury instead of having the parties bring witnesses into court, only two of the 153 said yes. From this it appears that the jury felt that something was to be gained from seeing the witnesses themselves. However it does not appear that the jurors felt that there was as much to be gained from the direct examination of the witnesses for when asked if the witnesses would have given the facts "truer and quicker" if they had been allowed to speak without questioning by their own lawyers they replied yes (103 to 49). The jurors almost completely reversed themselves upon the question of the value of cross examination by the opposing attorneys, for when asked if the witnesses would have given the facts "truer and quicker" if they had been allowed to speak without questioning by the lawyers on the other side they said no (107 to 41).

Several questions were asked to find out whether the jurors would favor increased control of the trial by the judge as a partial or total substitute for party prosecution. A good many of the jurors thought that the judge already actively directed the course of the trial rather than acting as an umpire or referee (61 to 92). And, as noted above, this did not prevent the unanimous approval of the

judicial conduct that they had observed. When questioned regarding the examination of witnesses, 152 thought that the witnesses would have given the facts "truer and quicker" if they had been asked questions by the judge instead of the lawyers. This by itself might seem to indicate that they favored displacing the lawyer entirely, but this is not the case; for when questioned directly on the point the feeling seemed to be that both lawyers and judges were necessary to the administration of justice. Asked whether it would have been better if the judge had taken a more active part in the trial—questioning witnesses, etc., the jurors were almost evenly divided (64 to 89), but when asked if the judge should have acted instead of the lawyers, the answer was almost a unanimous negative (145 to 7); instead the vote was 150 to 3 that the judge should act "along with the lawyers."

A further indication that the jurors recognized the value of the lawyer was to be found in the fact that when asked if "in a courtroom, without an audience, and if there were no technical rules to trap you would you want to present your own lawsuit to a jury?" five replied that they would; 148 said no. When similarly asked if they would be willing to present their own law suit to a judge alone, 23 said yes and 130 said no. When still further asked if they would like to present their case "if there were a lawyer on the other side," they voted against it (139 to 14).

The jurors almost unanimously rejected the suggestion that government boards or administrative tribunals be substituted for courts in handling some of the types of cases that they had heard. Three questions were asked: (1) ". . . government boards, instead of courts, now handle some types of cases; do you think their decisions as fair and just as those of courts?" Only 8 answered yes; 145 no. (2) "These boards make decisions at less cost in money and time. Does this make up for any few mistake decisions?" Again "Yes" — 8; 145 — "No." (3) "Should some of the types of cases you heard be shifted to similar government boards?" "Most?" (5) "Many?" (2) "Few?" (1) "None?" (145). It is quite apparent that the jurors' approval of judge control of the judicial process is not to be interpreted as a trend toward administrative tribunals and away from our present processes, but is rather an expression of approbation for the judge and increased judicial activity within the framework of the present system.

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